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Supreme Court of the United States

OCTOBER TERM, 1948

No. 129

WILLIAM T. URIE, PETITIONER,

vs.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED JUNE 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN CIRCUIT COURT OF CASS COUNTY, STATE OF MISSOURI

WILLIAM T. URIE, Plaintiff,

vs.

GUY A. THOMPSON, Trustee, Defendant

Appeal from the Circuit Court of Cass County, Missouri, Hon. Leslie A. Bruce, Judge.

This cause was instituted in the Circuit Court of Cass County, Missouri, On November 25th, 1941, by plaintiff, William T. Urie, against Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company, being case No. 23740 in said Court. The Fourth Amended Petition for Damages, omitting caption and signatures, is in words and figures as follows:

FOURTH AMENDED PETITION FOR DAMAGES

Plaintiff states that defendant is now and for several years past has been the duly appointed, qualified and acting trustee of the Missouri Pacific Railroad Company; that said railroad and said trustee are engaged in interstate commerce, and said railroad is an interstate railroad; that at the times herein mentioned the plaintiff and defendant [fol. 2] were both engaged in interstate commerce in the operation of interstate trains and cars and engines.

Plaintiff further states that prior to March 31, 1933, said railroad was operated by the Missouri Pacific Railroad Company, a corporation, and that plaintiff worked for said company as a fireman on its locomotives; that on said date said railroad went into bankruptcy under Section 77 of the Federal Bankruptcy Act; that Guy A. Thompson and L. W. Baldwin were appointed trustees for said railroad; that the said Baldwin thereafter resigned and the said Thompson became and is the sole trustee; that said railroad has been operated since March 31, 1933, by said trustees until the said Baldwin resigned and since then it has been operated by the defendant Thompson, that during all of said times the plaintiff worked as an engineer and fireman.

Plaintiff states that for about thirty years prior to May,

1940, he was employed by the defendant railroad chiefly as a fireman on locomotives operating in interstate commerce principally between Joplin, Missouri, and Kansas City, Missouri, during which times he was required by said railroad to work in the cabs and decks of said locomotives, that at all of said times the defendant caused, allowed and permitted noxious, deleterious and poisonous dusts and sand, the same varying from day to day, to enter into said cabs and decks of said locomotives in such quantities as to be harmful to the plaintiff and under conditions which plaintiff during the course of his work was required and did gradually breathe, inhale and absorb; that said dusts and sand which so entered into and permeated said cabs and decks contained a very high percentage or quantity of silica particles or silican dioxide, to-wit; ranging from 80 to 90 per cent, and came from the roadbed and the sanders of said locomotives polluting the air which plaintiff [fol. 3] breathed; that as a result of the cumulative effect of said gradual inhalation and absorbtion of said noxious, deleterious and poisonous substances over a period of years, the plaintiff became disabled on and after May, 1940, and he was caused to suffer the following severe, permanent and lasting illness, bodily injuries and conditions, as follows:

The tissues, structures and membranes of his nose, lungs, air passages, and respiratory system have become permanently inflamed, irritated, impaired and made sore. His ability to breathe has been impaired. He has been caused to suffer from and has a permanent impairment of his lungs and respiratory system, and the functions thereof weakened and damaged. He has been caused to suffer from fibrosis, silicosis, pneumoconiosis, tuberculosis, and silico-tuberculosis of the lungs. His ability to resist disease has been impaired. He suffers from severe pains in his breast and chest, fever, chills, loss of strength, nervousness, sleeplessness, coughing and pleural adhesions. He suffers from great physical pain and mental anguish and will continue to suffer said bodily pain and mental anguish because of said conditions. He has been rendered permanently sick. His ability to work and labor has been impaired and destroyed. He has lost his wages in the sum of about $250.00 per month, and he will continue to lose such wages in the future. Plaintiff states that he first discovered said injury and conditions in May, 1940.

Plaintiff states that the Boiler Inspection Act (45 U.S.C.A. Sec. 23) of February 17, 1911, as amended by the Congress of the United States on June 7, 1924, applicable to the use and operation of said interstate locomotives and appurtenances, provides:

"It shall be unlawful for any carrier to use or permit [fol. 4] to be used on its line any locomotive unless said locomotive, its boilers, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Plaintiff states that his said injuries and conditions were directly caused by the defendant's violation of said Boiler Inspection Act because said locomotives, which defendant used, were in improper condition and unsafe to operate in the service, and when their conditions constituted an unnecessary peril to plaintiff's life and limb in that when

1. Said dusts and sand would and did enter into and permeate the cabs and decks of said locomotives in quantities that were harmful to the plaintiff to breathe, inhale and absorb.

2. The sanders and sanding devices of said locomotives would loose and let out sand and so that harmful quantities of sand would and did come from the same when set in operation and when (a) the partitions or humps in the sand traps were out of adjustment, or were worn, (b) the sand domes or sand containers or sand boxes were loose at the boiler connections, (c) the sand pipes break or were broken off or were loose or were perforated, (d) the valves or traps holding said said were not in proper mechanical condition and were not properly adjusted.

3. The decks and connections on such locomotives would and did permit said dusts and sand to enter into said cabs [fol. 5] of said locomotives in quantities harmful to plaintiff when (a) the connections between the boiler and the deck were old, worn, or loose, (b) the grate-staff riggings were without covers, or (c) when such covers thereon were

warped, or bent, or did not fit, (d) the floor boards were worn, or loose, or contained open spaces.

4. The defendant failed to maintain said locomotives, cabs, decks, and the places where plaintiff was required to work in safe condition.

Plaintiff further states that because of all of the aforementioned facts he has been damaged in the sum of Sixty-five Thousand ($65,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the defendant in the sum of Sixty-five Thousand ($65,000.00) Dollars, and for his costs of suit.

IN CIRCUIT COURT OF CASS COUNTY

ANSWER TO FOURTH AMENDED PETITION AS AMENDED—Filed September 29, 1945

Comes now Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, and for his answer to the plaintiff's Fourth Amended Petition, as the same has been amended, denies each and every allegation therein contained except such as are hereinafter expressly admitted.

1. Said defendant admits that he is the duly appointed, qualified, and acting trustee of the Missouri Pacific Railroad Company, a corporation, pursuant to appointment by the United States District Court for the Eastern Division of Missouri under a proceeding in bankruptcy under Section 77 of the Bankruptcy Act.

2. The defendant admits that the plaintiff was employed [fol. 6] by him at various times after the defendant was appointed trustee of the Missouri Pacific Railroad from June 22, 1933 until in 1940 but the defendant denies that the plaintiff did work continuously for him and the defendant denies that the plaintiff became afflicted with silicosis or any other disease by reason of the failure of the defendant to fully perform his duties under the Boiler Inspection Act in connection with the operation of said railroad and denies that he has failed in any way to perform each and every duty cast upon him by law.

3. The defendant, further answering, avers that the plaintiff has filed no claim against the Missouri Pacific Railroad

Company, a corporation, and that the Court in this action has no jurisdiction over any acts complained of by the plaintiff prior to the filing and approval of a petition under Section 77 of the Bankruptcy Act, which said petition was filed and approved by the Eastern Division of the District Court of the United States on March 31, 1933, and this defendant, as such trustee, is not in any event liable for any act committed by the said corporation.

4. Further answering this defendant avers that the Supreme Court has held that the plaintiff could not recover in this action for negligence under the Federal Employers' Liability Act but this defendant avers that, notwithstanding such ruling, the plaintiff's fourth amended petition seeks to charge and recover for negligent acts and the defendant denies each and every such allegation contained in said petition.

5. Further answering, this defendant denies that the locomotives and appliances in use on said railroad were not at said time in the proper and safe condition to operate in the service to which they were put without necessary peril to the plaintiff and denies that the defendant allowed or permitted noxious, deleterious and poisonous dusts and sand [fol. 7] to enter into the cabs and decks of the locomotives used by him in quantities so as to be harmful to the plaintiff, and denies that as a result of the inhalation and absorption of noxious, deleterious, and poisonous substances the plaintiff became disabled.

6. Further answering, the defendant denies that he knew or could have known that the sand used on the locomotives contained a high percentage of silica or that the appliances for sanding on said engines were defective or that the cab was defective but this defendant avers that the locomotives in use by him as such trustee were kept in good mechanical condition and were inspected regularly and before every trip and were inspected by the inspector of the United States, operating under the Interstate Commerce Commission with regularity and the defendant avers that he did at all times comply with the regulations of the Interstate Commerce Commission with respect to the condition of the locomotives operated by him as trustee of the Missouri Pacific Railroad Company and that he in all things complied with the regulations of such Commission and the laws of

the United States with respect to said locomotives and that in fact he did at all times maintain said locomotives in safe condition for operation by the plaintiff.

7. This defendant with respect to the allegation in said petition that the Boiler Inspection Act was not complied with by the railroad Company, and that the operation of locomotives by said company was negligent and was not in compliance with the said Boiler Inspection Act, states the same does not state any cause of action against him as trustee of said railroad and is improperly included in said amended petition and this defendant has sought repeatedly to have the Court strike the allegation with respect to negligence and with respect to the conditions alleged to exist prior to his appointment as trustee stricken from said peti- [fol. 8] tion but has not succeeded in having the same done.

8. Further answering, this defendant denies that the sander and sanding device of said locomotives would lose and let out sand in harmful quantities or that the sand domes or any part of the sanding devices were not in proper mechanical condition or were not properly adjusted and this defendant avers that the sanders were, as required by the Interstate Commerce Commission, regularly inspected.

This defendant denies that the decks and connections of the locomotives permitted dust to enter into the cabs and denies that the connections between the boiler and the deck were old, worn-out, loose or that the grate-staff riggings were without covers or that the covers thereon were warped or bent or did not fit or that the floor boards were worn or loose or contained open spaces but avers the fact to be that the locomotives were at all times maintained in a safe condition and that they were maintained in the condition as required by the Boiler Inspection Act, and the Safety Appliance Act and the orders of the Interstate Commerce Commission.

9. Further answering, this defendant avers that if the plaintiff is suffering from Silicosis that the same is an occupational disease and that the Boiler Inspection Act, under which the plaintiff attempts to state a cause of action against this defendant, does not apply to or relate to such disease; that the Boiler Inspection Act, and the Safety Appliance Act were enacted by the Congress to Cover and include injuries received by employees and that neither of

them can be made the basis of an action for silicosis or any occupational disease.

10. Further answering, this defendant avers that the plaintiff's cause of action, if any, was not instituted until the 25th day of November, 1941, and that the alleged cause of action is barred by the statute of limitations; that the [fol. 9] plaintiff's action was required by Section 56, title 45, U. S. C. A., to have been commenced within three years from the date the cause of action accrued and that any cause of action which the plaintiff had by reason of the alleged violation of the Boiler Inspection Act and of the Safety Appliance Act with respect to the sanders or other parts of locomotives on which he worked was required to be brought within three years of the accrual of said cause of action, and was not so brought and is so barred. The right to sue under the Federal Acts is conditioned upon the suit being brought timely and under said Section 56 above referred to, the right was limited to two years until the amendment of April 11, 1939, when the limitation was extended to three years, and the defendant avers that the plaintiff's action was not brought within either of said periods and the cause of action which he attempts to set out in his fourth amended petition is barred and the petition does not state a cause of action because it fails to affirmatively set out the facts showing that the action was timely begun. The statute of the United States preserves the right as well as the remedy and the plaintiff's alleged cause of action is so barred and the defendant avers that the plaintiff's petition does not state cause of action because it fails to affirmatively set out the facts showing that the action for which recovery is sought was commenced in time.

11. Further answering, the defendant states that whatever injury plaintiff received, if any, was received by him prior to August 11, 1939, and that the plaintiff assumed the risk of injury from the inhaling of the sand or dust since the plaintiff pleads facts showing that he knew, and the defendant avers that he did in fact know, about the use of sand on the engines on which he worked and was fully aware as to their kind and condition and assumed any and all risk or injury therefrom.

[fol. 10] Wherefore, the defendant prays to be discharged herefrom with his costs.

IN CIRCUIT COURT OF CASS COUNTY

MINUTE ENTRY OF TRIAL

This cause came on for trial on the 22nd day of January, 1946, during the January Term of the Circuit Court of Cass County, Missouri, before Honorable Leslie A. Bruce, Judge of said Court, and a jury, the plaintiff appearing in person and by his attorneys, Trusty, Pugh, Green & Trusty, Lathrop Building, Kansas City, Missouri and Louis Wolfe, Joplin, Missouri, and W. M. Anderson, Harrisonville, Missouri, and the defendant appearing by his attorneys, D. C. Chastain and Chester Smith, Dierks Building, Kansas City, Missouri, and Ray L. Shubert, Harrisonville, Missouri, and the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to-wit: * * *

IN CIRCUIT COURT OF CASS COUNTY

INSTRUCTIONS

Instruction Number 1. (Given)

The Court instructs the jury that if you find from the evidence that the Missouri Pacific Railroad is an interstate railroad and that the trustees thereof and the defendant trustee herein, have been operating such railroad as an interstate common carrier in different states, and that the locomotives engines Tom Urie worked on were used by said trustees and the defendant trustee in such interstate commerce, and that during such period of years said trustees and the defendant trustee and Tom Urie, while working on the locomotives referred to, were engaged in carrying on, aiding and furthering interstate commerce, and were engaged in interstate commerce.

Then you are instructed by the Court that,

Under the Act of Congress on which this suit is brought, the trustees and the defendant trustee had the absolute and continuing duty to have such locomotive engines and all [fol. 11] their parts and appurtenances thereof, in proper condition and safe to operate in the service to which they were being put and so that the same could be employed and used in the active service of such interstate commerce without unnecessary peril to the life of Tom Urie, and,

In connection with the foregoing, you are further instructed that if you find from the evidence that during the years that Tom Urie was working for the said trustees and the defendant trustee as such locomotive employee, and the said trustees and the defendant trustee used and required Tom Urie to work on locomotives that were not in proper condition and safe to operate in the service to which they were being put and so as to expose the life of Tom Urie to unnecessary peril in such work, and if you further find from the evidence that said trustees and the defendant trustee used in the sanding appliances on such locomotives and on the roadbed over which said locomotives were being operated the kind of silica material referred to in the evidence, and if you further find from the evidence that such silica material would and did come from such sanding appliances and go under the wheels of such locomotives in such quantities as to create and produce harmful quantities of silica dust, and if you find from the evidence that it did so come through the sanding pipes and under the wheels by reason of such mechanical conditions of such sanding appliances as referred to and explained in the evidence, and if you further find from the evidence that such roadbed material also contained harmful quantities of such silica dusts, and if you further find from the evidence that in the cab decks of locomotives there were such openings and holes at places and in sizes and in such condition as referred to and explained in the evidence, as to allow and permit such silica dusts from under the wheels and from the roadbed to come through such openings and holes and into the cabs in [fol. 12] such quantities as to be harmful to Tom Urie in breathing such dusts while doing his work for said trustees and defendant trustee as a fireman, and if you find from the evidence that such silica dusts from said roadbed and from such sanding appliances when so crushed under said wheels would and did come upward and through said openings in the decks of the cabs on which Tom Urie worked for said trustees and said defendant Trustee, and that it would and did so come into said cabs while said locomotives were in operation and in harmful quantities, and find it would be and was in such quantities as to be harmful and injurious to the lungs of Tom Urie when breathed by him, if you so find, while he was engaged in doing his work for said trustees, and said defendant trustee as a fireman on such locomotives, and if you find from the evidence that Tom Urie

had silicosis or silico-tuberculosis, and if you find from the evidence that Tom Urie became incapacitated from such lung condition, or conditions, in May, 1940, of Tom Urie were caused by and came from and were a direct result of the cumulative effect of breathing such harmful quantities of silica dusts, if you so find from the evidence such facts, and while so working for said trustees and the defendant trustee as a fireman in such locomotive cabs, then it becomes your duty to return a verdict for the plaintiff, Tom Urie, and against the defendant trustee.

Instruction Number 3. (Given)

You are also instructed that in considering the evidence and in determining therefrom the issues under Instruction No. 1 in favor of Tom Urie, you are not to give any consideration to or be influenced by, the question as to whether said trustees and the defendant trustee were negligent or not negligent, because this case is based entirely upon the Federal Boiler Inspection law as explained to you in instruc-[fol. 13] tion number 1, and by reason thereof negligence is not involved and is wholly immaterial.

Instruction No. Four. (Given)

You are also instructed that if you find from the evidence the facts and issues as submitted in instruction Number 1 in favor of Tom Urie, and if you find from the evidence that while Tom Urie was working on the railroad he did not have any lung condition that was disabling and incapacitating prior to April, 1933, and if you find from the evidence that Tom Urie developed and became incapacitated in May, 1940, from silicosis or silico-tuberculosis as submitted in Instruction number 1, then it would be your duty to return a verdict for Tom Urie, even though you find that Tom Urie did have lung trouble or lung ailment while working on the railroad prior to the time said trustees and the defendant trustee herein commenced operating said railroad in April, 1933.

Instruction No. 5. (Given)

The jury is also instructed that if you so find from the evidence the facts and issues for Tom Urie under Instruction number 1, then it would be your duty to return a verdict for him, even though you find from the evidence he breathed

silica dust in harmful or not harmful quantities during years prior to April, 1933.

Instruction Number 6. (Given)

You are also instructed that if you find from the evidence the issues in and under instruction Number 1 in favor of Tom Urie, and that silica dusts did come through openings in the decks of engines and into the cabs Tom Urie worked on, and did so in quantities harmful to him, and that such dusts did cause injuries to Tom Urie's lungs as submitted to you in instruction Number 1, if you so find from the [fol. 14] evidence, then the question and evidence as to when, how and how often the employees of the trustees and the defendant trustee inspected such engines would be no defense.

Instruction No. 7 (Given)

Gentlemen of the jury, you are further instructed that if from the evidence and under instruction Number 1, you find the issues for plaintiff, Tom Urie, and against the defendant, then it becomes your duty to allow him such a sum as you find from the evidence will reasonably and fairly represent the pecuniary value of such damages you find from the evidence Tom Urie sustained and is reasonably certain to sustain in the future as a direct result of such injury and physical disability you find he sustained to his lungs as a direct result of breathing such silica dusts, if you so find from the evidence.

In considering and determining the amount of such sum and such damages, you may take into consideration such physical pain and mental anguish you find from the evidence Tom Urie has suffered to date, and that you find from the evidence he is reasonably certain to suffer in the future, as a direct result of such injury;

Also you should take into consideraton such earnings or wages you find from the evidence Tom Urie has lost to date and as a direct result of such injuries you find he so sustained, not to exceed the sum in evidence and not over $16,750.00;

Also, you should take into consideration such earnings and wages you believe and find from the evidence he is reasonably certain to lose and sustain in the future and as a direct result of such injury you so find;

You should also take into consideration the evidence relating to Tom Urie's age, his habits, his physical condition, both past and present, the nature of the work he was engaged in, his earning capacity at the time of his injury [fol. 15] and all evidence relating to his probable expectancy of life.

Your whole award, if you so find, should be stated in one lump sum and cannot exceed the pecuniary value of such damages and in no event can your award exceed the sum of Sixty-Five Thousand Dollars ($65,000.00), the amount sued for. In mentioning this amount the Court does not mean to direct you to find for the plaintiff in that sum or in any sum, but merely mentions the amount claimed.

Instruction Number 2 (Given)

If you find from the evidence the facts and issues in favor of Tom Urie to be as outlined and submitted in instruction No. 1, then you are instructed that plaintiff has met and carried the burden of proof required under the law and under the instruction herein.

Instruction No. S (Given)

The Court instructs the jury that the burden of proof is upon the plaintiff to prove by a preponderance of the credible evidence in this case that silica dust in sufficient quantities to be harmful to the plaintiff came into the cabs of the locomotives on which the plaintiff worked, and unless you find such to be the facts, then your verdict should be for the defendant.

Instruction Number U (Given)

The Court instructs the jury that if you find and believe from the evidence that the impairment of the lung condition

of the plaintiff, if any, was not caused by reason of his employment by the defendant, then your verdict shall be for the defendant.

[fol. 16] Instruction Number R (Given)

The Court instructs the jury that plaintiff claims in this action that the defendant failed to keep its locomotives upon which the plaintiff worked safe to operate in the service to which the same were put in that the sanders and sanding devices on said locomotives would lose and let out sand so that a harmful quantity of sand would and did come from the same when set in operation, and that the partitions in the sand traps were out of adjustment and were worn, and that the sand domes or sand containers or sand boxes were loose at the boiler connections, and that the sand pipes were broken off or were loose and perforated, and that the valves on the traps that held said sand were not in proper mechanical condition and not in proper adjustment, and that the decks and connections of such locomotives did and would permit sand dust and sand from the said sanders and sanding devices and from the road bed to enter into the cabs of such locomotives on which plaintiff worked when the connections between the boiler and the decks were old, worn or loose and when grate shaker riggin-s were without covers, or when such covers were warped, bent or did not fit, and when the floor boards were worn or loose or contained open spaces, and the plaintiff further claims that by reason thereof plaintiff was caused to breathe silica dust and so to contract silicosis. The Court instructs you that the burden of proof is on the plaintiff to show by a preponderance of the credible evidence in this case that the locomotives of the defendant on which plaintiff worked were defective and unsafe in the manner hereinbefore set forth and charged in plaintiff's petition, and unless you further find that the defendant's locomotives on which the plaintiff worked were defective and unsafe in the particulars herein set out, and that by reason of such defects, if any, silica dioxide dust

[fol. 17] did enter into the cabs of such locomotives in harmful quantities, then you are instructed that you cannot find for the plaintiff and your verdict must be for the defendant.

The Court of his own motion gave the following Instruction:

The Court instructs the jury that nine or more jurors may render a verdict for either party in this case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agree to it.

In Circuit Court of Cass County

Verdict—January 29, 1946

Thereafter, the jury having heard the reading of the instructions, arguments of counsel, retires to consider their verdict. After due consideration on January 29, 1946, the jury then return the following verdict into open Court:

"We, the jury, find the issues in favor of the plaintiff, Tom Urie, and do fix his recovery in the sum of Thirty Thousand Dollars."

W. J. Bradford, Foreman.

In Circuit Court of Cass County

Judgment—January 29, 1946

It is therefore considered and adjudged by the Court that plaintiff have and recover from and against the defendant the sum of $30,000.00, with interest thereon from this date at the rate of 6% per annum together with all of the costs and charges laid out and expended and that he have execution therefor.

[fol. 18] IN CIRCUIT COURT OF CASS COUNTY

MOTION FOR NEW TRIAL.—Filed February 6, 1946

Comes now the Defendant herein and moves the Court to set aside the verdict and judgment entered thereon and grant him a new trial herein for the following reasons:

1. Because the Court erred in overruling Defendant's Motion to Dismiss the Plaintiff's fourth Amended Petition, because the same did not state a cause of action under the Boiler Inspection Act and because said Fourth Amended Petition does not contain any allegation of defects in any safety appliances on any locomotives and because the said amended petition, if it states any cause of action is a departure from the cause of action in the third Amended Petition, and because said Amended Petition fails to state facts upon which relief could be granted.

2. Because the Court erred in overruling the Defendant's motion to require the Plaintiff to make his petition more definite and certain.

3. Because the Court erred in permitting the Plaintiff over the Defendant's objection to amend the fourth amended petition during the trial and because the Court erred in overruling the Defendant's motion to dismiss because the fourth amended petition as amended during the trial failed to state facts upon which relief could be granted.

4. Because the Court erred in admitting incompetent, irrelevant and immaterial testimony offered by the Plaintiff and over the objection and exception of the Defendant.

5. Because the Court erred in failing and refusing to admit relevant and competent testimony offered by the [fol. 19] Defendant.

6. Because the Court erred in refusing to permit the Defendant to introduce and show the regulations of the Interstate Commerce Commission as to the Safety requirements of the engines which regulations were enacted pursuant to authorization in the Boiler Inspection Act and which specify the defects in locomotives which are required to be corrected and erred in refusing the Defendant to offer testimony showing that there were no defects in the locomotives on which the Plaintiff worked, which were prohibited by

the Interstate Commerce Commission orders, and erred in refusing to admit testimony offered by the Defendant of inspection of locomotives by Federal Inspectors as required by the Safety Appliance Act.

7. Because the Court erred in refusing to admit the published reports of the Interstate Commerce Commission showing the results of Federal inspection of locomotives under said act, as far as the same related to the Missouri Pacific Railroad.

8. Because the Court erred in refusing to permit testimony of witnesses to the effect that Plaintiff could not have contracted silicosis from the sand from the sanding devices of the locomotives.

9. Because the Court erred in admitting testimony offered by the Plaintiff over the objection and exception of the Defendant as to sand dust arising from the ballast between the rails of its tracks and from the roadbed; because said testimony did not tend to show that the dust from such ballast was occasioned by any violation of the safety appliances acts, and because there was no evidence as to the size of fineness of the dust.

10. Because the Court erred in submitting the case to the jury; because the Plaintiff failed to show facts upon which [fol. 20] a recovery could be based; because there was no showing as to the concentration of dust that got into the locomotive cabs in which the Plaintiff worked and there was no showing as to the fineness of any dust that got into such cabs or that it created a condition which could have caused the Plaintiff to be afflicted with silicosis; because the Court erred in refusing to permit the Defendant to adequately cross-examine the Plaintiff and in refusing the Defendant to prove by the Plaintiff that he was drawing a pension under the Railroad Retirement Act of $90.00 (ninety) per month; because the Court erred in admitting over the objection and exception of the Defendant, evidence as to the conditions of the locomotive on which the Plaintiff worked while employed by the Railroad and prior to the appointment of the defendant as Trustee thereof.

11. Because the Court erred in admitting evidence as to the conditions under which the Plaintiff worked prior to the time the Defendant was appointed Trustee of the Mis-

souri Pacific Railroad, and erred in overruling the Defendant's objection to such testimony and erred in refusing to limit the Plaintiff to proof of conditions existing since the Defendant's appointment as Trustee of the Missouri Pacific Railroad.

12. Because the Court erred in overruling the defendant's motion to exclude for consideration by the jury, all evidence of the dust coming from the roadbed of the railroad which the Defendant made at the conclusion of the Plaintiff's testimony.

13. Because the verdict is the result of passion and prejudice on the part of the jury.

14. Because the verdict shaould have been for the Defendant and is against the weight of evidence and is against the law and the evidence.

15. Because the verdict is excessive.

16. Because the Court was not impartial but was biased [fol. 21] and prejudiced against the Defendant and the Defendant was not accorded a fair and impartial trial.

17. Because the Court erred in giving, over the objection and exception of the Defendant, instructions one to seven, inclusive, and erred in giving all instructions given on behalf of the plaintiff.

18. Because the Court erred in refusing to give instructions "A" to "Q" and each of them offered by the Defendant.

Wherefore, the Defendant prays that the verdict and judgment entered thereon be set aside and he be granted a new trial herein.

Thomas J. Cole, Ray Shubert, Gardner Smith, D. C. Chastain, Attorneys for Defendant.

IN CIRCUIT COURT OF CASS COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL—March 18, 1946

Thereafter and on the 18th day of March, 1946, the same being the 17th Judicial Day of the January Term, 1946, of this Court comes parties by their respective attorneys on

defendant's Motion for New Trial heretofore filed herein, which is taken up, heard, and by the Court overruled. To which action of the Court in so overruling said motion the defendant excepted and still excepts.

IN CIRCUIT COURT OF CASS COUNTY

NOTICE OF APPEAL AND APPEAL BOND

Thereafter and on the day last above mentioned comes defendant, by attorney and files herein notice of Appeal. Whereupon the Court fixes appeal bond of the defendant in the sum of $40,000.00, said appeal bond to be filed herein in time provided by law.

[fol. 22] IN CIRCUIT COURT OF CASS COUNTY

NOTICE OF APPEAL—March 18, 1946

Notice is hereby given that Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, the above named defendant, appeals from the judgment heretofore entered in this cause against him on January 29, 1946, to the Supreme Court of the State of Missouri.

Dated: This 18th day of March, 1946.

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, Defendant, by D. C. Chastain, his attorney of Record.

Which Notice of Appeal was filed in the office of the Clerk of Supreme Court on the 23rd day of March, 1946.

IN SUPREME COURT OF MISSOURI

39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee, Appellant

ORDER RE FILING OF TRANSCRIPT—November 18, 1946

Comes now the clerk of the circuit court of Cass County and files herein a transcript of record in the above entitled cause.

[fol. 23] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ASSIGNING CASE TO DIVISION ONE—January 27, 1947

Now at this day it is ordered by the court that the above entitled cause be assigned to Division One.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—April 30, 1947

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 24] IN SUPREME COURT OF MISSOURI

39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of Cass County

JUDGMENT—September 8, 1947

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cass County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed).

[fol. 25] IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, APRIL SESSION, 1947

No. 39,908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

OPINION—September 8, 1947

Action under Federal Employers' Liability Act, 45 USCA, Sec. 51 et seq., charging violations of the Boiler Inspection Act, 45 USCA, Sec. 23 et seq. A jury returned a verdict awarding plaintiff $30,000 damages and defendant, trustee of Missouri Pacific Railroad Company, has appealed from the judgment entered.

Heretofore the case has been considered upon the question of the sufficiency of the original petition (Urie v. Thompson, 352 Mo. 211, 176 S. W. (2d) 471), it being held the petition stated facts sufficient to support a recovery for a breach of the Boiler Inspection Act. Upon remand, plaintiff amended his petition to more specifically allege violations of the Act.

The petition as amended contained the allegations that defendant caused, allowed and permitted noxious, deleterious and poisonous dusts and sand, in harmful quantities, the same varying from day to day, to enter the cabs and decks of locomotives in which plaintiff was required to work as a fireman, whereby plaintiff gradually inhaled silica particles resulting in silicosis, or silico-tuberculosis—defendant's locomotives were unsafe to operate in the service and constituted an unnecessary peril to life and limb in that dusts and sand would and did enter into and permeate the cabs and decks in quantities harmful to [fol. 26] plaintiff to breathe; the sanding devices would loose sand so that harmful quantities would come from the same when set in operation; the sand domes were loose at the boiler connections; the sand pipes were broken off, or were loose or perforated; the traps holding sand were not in proper mechanical condition and were not properly adjusted; the connections between the boiler and the deck were old, worn, or loose; the grate-staff riggings were without covers, or the covers were warped, or bent, or did not fit; the floor boards were worn, or loose, or contained open spaces; and defendant failed to maintain his locomotives, cabs and decks where plaintiff was required to work, in safe condition.

Defendant denied the locomotives were in an unsafe condition; and denied plaintiff became disabled as a result of the inhalation of any deleterious substance entering into the cabs and decks of defendant's engines. Defendant alleged the locomotives were regularly inspected by inspectors of the Interstate Commerce Commission, and that all regulations of the Commission had been complied with; averred silicosis is not within the purview of the Boiler Inspection Act; and further interposed the plea of limitation of action (45 USCA, Sec. 56).

On this appeal there are thirty-two assignments of error. Not all of the assignments were developed in appellant-

defendant's brief by citation of authorities and argument. The assignments of error neither briefed nor argued are, for the purpose of this appeal, abandoned. Petty v. Kansas City Public Service Co. (Mo. Sup.), 198 S. W. (2d) 684; Supreme Court Rule 1.08. The scope of review of the instant case, an action at law tried upon facts with a jury, is generally governed by Sections 123 and 140, Civil Code of Missouri, Laws of Missouri, 1943, p. 370 and pp. 395-6, and Rule 1.08, supra, but with a regard for Supreme Court Rule 3.27. See In re Duren —— Mo. ——, 200 S. W. (2d) 343, treating with a case tried upon facts without a jury.

It is said by defendant that the petition does not state and the evidence does not support a claim under the Boiler Inspection Act; and that plaintiff's action is barred by limitation; and errors are assigned in the admission and exclusion of evidence, and in instructing the jury.

[fol. 27] Plaintiff, now 57 years old, had commenced work for the Missouri Pacific Railroad Company July 4, 1908, and left defendant's employment in May, 1940. He was principally employed as a fireman on engines on the line from Joplin to Kansas City. He had been interested in a mine and, early in his employment and when he was on the extra board, ran a hoister and pumped water for about sixty days down at "Tan Yard Holler." He also worked out at "Smeltry Hill" for about three weeks; "put in a pump and operated it a while." He had not worked as a "regular miner, down in the mine getting out ore." In 1914 he had "walking typhoid"; he "laid off" and went to Oklahoma, being away from his work with the Missouri Pacific five or six months; however, he worked on all but about 60 days of that time for a contractor in the Oklahoma oil fields.

The sand used in the sanding devices of defendant's locomotives was "tailings" from the lead and zinc mines of Webb City and Carterville, Jasper County. The tailings were also used as ballast on the roadbed. Various samples of the tailings or sand contained 97.2% to 97.87% free silicon dioxide. Sand used in the engines was finely ground. A sample of sand exhibited by defendant and stated to have been crushed under the wheels of a locomotive contained 97.8% silicon dioxide—96% passed through a 20-mesh screen, 74% passed through a 40-mesh screen, 46% passed through an 80-mesh screen, 45% passed through a 100-mesh screen, 29% passed through a 200-mesh

screen, and 9% passed through a 325-mesh screen. 8.25% of the particles were of 10 microns size or smaller. Of the sand exhibited by defendant (which, it was stated, had not been crushed beneath the wheels of a locomotive), no particles passed through a 325-mesh screen. A witness for plaintiff, testified of a test made by him at plaintiff's request. Sand, stated to have been procured from defendant's sand house at Joplin, was placed in a glass jar. The jar and contents were shaken and a sample of the air "in the space at the top of the jar" was found to contain 5,100,000 particles smaller than 10 microns, and 750,000 particles smaller than 5 microns per cubic foot of air. (Physicians, witnesses for plaintiff, testified the specific concentration of [fol. 28] particles under 10 microns in size and of 97% free silica which may "be present in the air a person breathes without harmful effects" is 3,000,000 to 5,000,000 per cubic foot.) The witness was asked, "If you had this sand blown from the sander on the engine two-thirds of the length of the engine by air pressure, if it was this kind of sand, and it was blown that distance, you would have a much lesser percentage of particles smaller than ten microns? A. My answer would be conjecture. I have had no experience in testing samples under those conditions. The concentration present in the air under those conditions would be the result of many factors."

Plaintiff testified that in May, 1940, he commenced to have pains "all through" his chest; he got very short of breath and "kept getting a little worse and a little worse." He consulted a physician who took X-ray photographs; and later, June 21st, plaintiff reported to the hospital of the Missouri Pacific Association at St. Louis for examination. X-ray films disclosed a mottled "snow storm effect" (diffused throughout the upper two-thirds of both lungs); said by experts, witnesses for plaintiff, to be indicatory, in their opinion, of nodules formed in the calcification of the pulmonary fibrosis, scar tissue, formed after a person has harmfully inhaled silica dust into the lung structure itself. Plaintiff's experts "came to the conclusion the man was suffering from a disease known as silicosis."

Physicians, specialists in diseases of the lungs, witnesses for defendant, were of the opinion plaintiff suffered pulmonary tuberculosis; that the X-ray photographs disclose a tuberculosis infection that is widespread throughout the upper and lower lobes equally; that X-ray findings do not sug-

gest silicosis; and that the small calcified "snow storm effect" areas are typical of what are called Ghon's nodes, that is, simply a tuberculosis of the lungs which heals out with small circumscribed places "that are all the same size, and they heal out, more or less, with a calcification in the area." [fol. 29] Bruce Brill, a witness for plaintiff, testified he had worked at the Missouri Pacific roundhouse at Joplin for about 18 years and until November 4, 1942; that the "engines that came in * * * I would say most of them, at least three out of five, would have the sanders reported in bad order * * * maybe it was a broken nipple, something in the dome, or a loose connection." A broken nipple would cause the sand to dribble onto the rails under the drivers, and the "speed would suck it up into the cab after it was ground under the wheels." The dust would be sucked in "through the deck and around the boiler head or openings in the grate shakers." When the witness cleaned out the cabs he found sand particles and roadbed dust. Plaintiff had worked on coal burning engines. When shoveling coal he was "something like two feet" from the grate shaker openings. Some coal dust would be stirred up, but "we had a hose there to keep it dampened down good." (The relationship that exists between the breathing of inorganic dust and tuberculosis has always been believed to be a close one. However, there is a strong tendency to assume that coal dust of itself is relatively harmless and that when mixed with silica has a retarding influence not only on the effects of the silica but also on the tubercle bacillus. Norris-Landis, Diseases of the Chest, 6th Ed., p. 578; Rubin, Diseases of the Chest, p. 340.) Plaintiff testified the (sand) dust would "come up through the openings in the cab floors, around the grate shaker riggings and the stoker head in the deck of the engine on each side of the fire door against the boiler head. * * * Sometimes there would be wide cracks between the boiler head and the deck floor where the bolts were broken off and it was worn and loose. The deck boards would be cracked and sometimes slivered out, and it would come through any openings like that; * * * would collect on the lights; * * * would get our clothing very dusty; * * * make your mouth and nose very dry."

Negligence is not the basis for liability under the Boiler Inspection Act. Instead, it "imposes upon the carrier an [fol. 30] absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary

peril to life or limb." Southern Ry. Co. v. Lunsford, 297 U. S. 398, 56 S. Ct. 504. See also, Lilly v. Grand Trunk Ry. Co., 317 U. S. 481, 63 S. Ct. 347, and cases therein cited. The Interstate Commerce Commission is authorized to set the standards of compliance by prescribing "rules and regulations by which fitness for service (of locomotives, tenders and their appurtenances) shall be determined," Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207, provided the Commission finds such are required to remove unnecessary peril to life or limb. The Act is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Lilly v. Grand Trunk R. Co., supra. In the Lilly case the Supreme Court of the United States observed the Interstate Commerce Commission had set a standard by promulgating a rule (No. 153) that the "top of tender behind the fuel space shall be kept clean * * *." The petitioner, Lilly, fell from the top of the locomotive tender. "As to the circumstances of the accident, petitioner testified that the top of the tender (over an area of some six square feet) was covered with ice." Standing on the ice petitioner reached (by means of a hooked rod) for a water spout preparatory to filling the tender's tank with water. As he pulled the spout, the rod's hook slipped on the spout, and his feet simultaneously slipped on the ice, causing him to fall to the ground. Since the jury found the tender did not leak, the condition was not due to any mechanical defect; nevertheless, the top of the tender had not been kept "clean" as required by Rule 153, and the foreign matter, ice, caused the "accident." The injury in the Lilly case was *accidental.* In the former review (Urie v. Thompson, supra) this court ruled with the Lilly case that (in order to state a violation of the Boiler Inspection Act) it is unnecessary that there be alleged (or shown) a *defect* in construction or mechanical operation. It was said, a sanding device "which is out of adjustment is an *unsafe* appliance, the very thing that the [fol. 31] carrier, under the Boiler Inspection Act, *insures* against." In the former review this court did not treat with contention that "silicosis" is not an evil at which the Act is aimed. If none of the consequences which a statutory enactment was designed to guard against has resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. 38 Am. Jur., Negligence, Sec. 163, p. 834; Vol. II,

Restatement of the Law of Torts, Sec. 286, p. 752, et seq.; 45 C. J., Negligence, Sec. 111, pp. 726-7.

This brings us to a more particular examination of appellant-defendant's contention that the Boiler Inspection Act is designed to guard against "accidental" injury, and that silicosis is not within the purview of the protection of the Act. Respondent-plaintiff has reminded us of Rules 101, 116(a), and 120, approved by orders of the Interstate Commerce Commission. Rule 101 provides that the railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control. Rule 116(a) provides that cabs shall be securely attached or braced and maintained in a safe and suitable condition for service; and cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab. And Rule 120 provides that locomotives shall be equipped with proper sanding apparatus, which shall be maintained in a safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails. Generally, these rules appear to be directed to the safe construction, and the maintenance of the locomotive and its appurtenances or equipment in a safe and suitable condition for the operational service "to which the same are put", all to the end "that the same may be employed in the active service without unnecessary peril to life and limb." 45 U S C A, Sec. 23, infra. The prime purpose of the Act being the protection of employees (and others) by requiring the use of safe equipment, the Act should be given liberal, not a narrow or strict, construction. Yet the Act, imposing an absolute duty to use safe equipment, should justly be interpreted as imposing the duty to keep the equip-
[fol. 32] ment safe in the protection from those injuries within the fair meaning of the language used. Compare Johnson v. Southern Pacific R. Co., 196 U. S. 1, 25 S. Ct. 158. See also discussion of interpretation of Statutes, United States v. American Trucking Associations, 310 U. S. 534, at pages 543-4, 60 S. Ct. 1059, at pages 1063-4. It is fairly and reasonably to be understood from the reading of the Rules and the Section that the purpose of the Act is to impose the absolute duty to so maintain the locomotive, and all parts and appurtenances thereof for service that unnecessary risks of accidental injury are avoided. There

seems to be no expression reasonably indicatory of a purpose to require the engine and its appurtenances to be so constructed and maintained as to protect against injuries due to the presence of dusts in the cabs of locomotives. There is a definite differentiation, generally, in the adjudicated cases, between "accidental injury" (accidental in the sense that the injury is attended by force or violence), and pneumoconiosis (including silicosis), which is evidenced by pathological changes in lung structure attributable to the effects of the inhalation of harmful dusts over a period of time. Vol. 1, Words and Phrases, Accident, p. 250, particularly at page 299 et seq.; Smith v. Harbison-Walker Refractories Co., 340 Mo. 389, 100 S. W. (2d) 909; Bolosino v. Laclede-Christy Clay Products Co. (Mo. App.), 124 S. W. (2d) 581; Wurst v. American Car & Foundry Co. (Mo. App.), 103 S. W. (2d) 6; Billo v. Allegheny Steel Co., 328 Pa. 97, 195 Atl. 110. See also, Norris-Landis, Diseases of the Chest (6th Ed.), p. 568; Mansfield v. Wagner Electric Mfg. Co., 294 Mo. 235, 242 S. W. 400.

Defendant cites the case of Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207. The reading of this case does disclose a tacit recognition of the validity of the States' argument that the federal regulation endeavors solely to "prevent accidental injury in the operation of trains." The subjects of the state statutes involved in the case, and of the Boiler Inspection Act were the same—"*the equipment of locomotives.*" It was held that state legislation (although endeavoring to prevent sickness and disease and *affecting safety*, if at all, only incidentally) was precluded, [fol. 33] "because the Boiler Inspection Act, as we construe it, was intended to occupy the field." The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or *however different their purpose*" (our italics). The Commission's power is ample to prescribe equipment promoting health, because keeping firemen and engineers in good health, like preventing excessive fatigue, through limiting the hours of service", *clearly promotes safety.* After the Napier decision there were further subsections added to Rule 116. We particularly notice subsection (g), added May 7, 1928, "Unnecessary or excessive openings in locomotive cabs around reverse levers, grateshaker levers, pipes, rods, running boards,

doors, windows, between cab and boiler, around wind sheets, or at any other place in cab or deck where rain, snow, or wind may enter shall not exist on any locomotive used during the period from November 1 to April 1 within the territory (including Missouri) specified in paragraph (d)." Such subsection was manifestly added in the purpose of protecting from inclement weather generally attending the stated period of the year in the stated territory. By thus being protected from the discomfort and distraction of the rain, snow and wind the engineer and fireman are more attentive—this clearly *promotes safety.* Napier v. Atlantic Coast Line, supra.

Plaintiff has cited the case of Sadowski v. Long Island R. Co., 292 N. Y. 448, 55 N. E. (2d) 497, wherein a recovery under the Federal Employers' Liability Act was upheld for silicosis with tuberculosis superimposed. A substantial part of plaintiff's duties was to fire stoves and handle sand, in a sand house, in a sand-drying and screening process preparatory for the use of the sand in defendant's locomotives. The action was based upon negligence. Defendant should have taken precautions to protect plaintiff from the consequences which might reasonably be anticipated from being required to work "in more or less of a cloud of silica dust which enveloped him and which he necessarily in-[fol. 34] haled." This case is not helpful upon the question whether an injury, a so-called "occupational disease", as distinguished from accidental injury, is within the protection designed to be afforded by the Boiler Inspection Act.

At the first national convention of state railroad commissioners held in March, 1889, a resolution was adopted, "Whereas thousands of railroad employees are killed or injured in coupling or uncoupling freight cars in interstate traffic and in handling the brakes of such cars, and most of these accidents can be avoided by the use of uniform automatic couplers and train brakes; * * * Resolved, that we do respectfully and earnestly urge the Interstate Commerce Commission to consider what can be done to prevent loss of life and limb in coupling and uncoupling freight cars in interstate commerce. * * *" The requirements of the various states relating to the equipment were then conflicting and diverse. President Harrison, in his final message to Congress, December 5, 1892, said, "Statistics * * * show that during the year ending June 30, 1891 there were forty-seven different styles of car couplers reported to be

in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly sixteen per cent of the deaths occurred in the coupling and uncoupling of cars, and over thirty-six per cent of the injuries had the same origin." To meet this situation, Congress, in 1893, enacted the original Safety Appliance Act, and somewhat later, and for like reasons, the Hours of Service Act, followed in time by the Ash Pan Act, and the Boiler Inspection Act. See Vol. 2, Roberts, Federal Liabilities of Carriers (2d Ed.), Sec. 501, pp. 1023-1026. The origin and history of the Boiler Inspection Act is also stated in Napier v. Atlantic Coast Line, supra (272 U. S. at pages 608-609). The Boiler Inspection Act, as enacted in 1911, applied only to the boiler. Its purpose was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." 36 Stat. 913. The Act was extended by [fol. 35] amendment in 1915 to include the entire locomotive and tender and all parts and appurtenances. 38 Stat. 1192. In 1924, the Act was further amended, 43 Stat. 659, so that Section 2 thereof reads, "That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions (See Sections 28, 29, 30 and 32; 45 U S C A) of this Act and are able to with-tand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U S C A, Sec. 23. We see it is provided in Section 8 of the Act, 45 U S C A, Sec. 32, "In the case of *accident* resulting from failure from any cause of a locomotive boiler or its appurtenances, *resulting in injury or death* * * * a statement forthwith must be made in writing of the fact of such accident" (our italics). In a footnote at page 609 of 272 U. S. (Napier v. Atlantic Coast Line, supra) are listed some of the various devices the Interstate Commerce Commission had required as equipment for the locomotives used in interstate commerce. And the more recent rules and regulations for in-

spections of locomotive boilers and their appurtenances are found in 49 C. F. R., Section 91.1 et seq., page 1236 et seq. From these rules it is apparent the Interstate Commerce Commission has looked to the safety of the employee as purposed by the Act from the standpoint of safety from accidental injury in the operation of trains. It seems to us the Act (considering the language of the Act itself, its preamble, its history, and its ancillary regulations) is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts. [fols. 36-37] The judgment should be reversed.

It is so ordered.

Paul Van Osdol, Commissioner.

IN THE SUPREME COURT OF MISSOURI

ORDER ADOPTING OPINION

Per Curiam: The foregoing opinion by Van Osdol, C., in Division One, is adopted as the opinion of the Court En Banc. All of the Judges concur.

[fol. 38] IN THE SUPREME COURT OF MISSOURI

[Title omitted]

MOTION OF RESPONDENT FOR REHEARING OR IN THE ALTERNATIVE TO TRANSFER THE CAUSE TO THE COURT EN BANC—Filed September 23, 1947

Comes now the Respondent herein (hereinafter referred to as Plaintiff) and moves this court to grant him a rehearing or in the alternative to transfer the cause to the court en banc for the following reasons, to-wit:

I

The court has overlooked prior controlling decisions of this court in its present opinion because it fails to follow the law as declared by it on prior appeal in Urie v. Thompson, 325 (Mo.) 211, 176 SW 2d 471, which opinion became controlling upon this court on this appeal.

II

This court misconstrued the facts and the law in holding that the former opinion did not pass upon the contention that silicosis was not an evil at which the Boiler Inspection Act was aimed since the former opinion passes on the precise point, l.c. 475, and since the opinion was on demurrer to the petition, it was a direct holding in favor of plaintiff *"on every issue that could have been raised under the demurrer."*

III

This court overlooked the material rule of law that "questions adjudicated on former appeal are not open for examination on this appeal." State ex rel Winkle Etc. Co. v. U.S.F.G. Co. (Mo.) 40 SW 2d 1050, l.c. 1052.

[fol. 39]

IV

This court has overlooked controlling decisions holding that a State court is bound to follow the interpretation of Federal Statutes placed upon them by the Federal Courts, whether or not the Federal conclusions seem wise.

V

This court has overlooked or misconstrued controlling opinions of the Supreme Court of the United States holding that violation of a Federal Safety Appliance Act gives rise to a right of recovery if such violation is the proximate cause of an injury, regardless of whether or not the act was passed for the purpose of protecting against the particular injury suffered

L & N R. R. Co. v. Layton, 244 U.S. 617, 37 S.Ct. 456.
Davis v. Wolfe, 263 U.S. 239, 44 S.Ct. 64.

VI

This court has overlooked controlling decisions of the Supreme Court of the United States which hold that, "in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the wrong done to him contrary to said law." The opinion denies recovery for a wrong done in violation of a

statute enacted specially for a class to which plaintiff belonged.

Texas and Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482.

San Antonio Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

VII

The opinion overlooks controlling decisions of the Supreme Court of the United States holding that the Boiler Inspection Act was passed to promote safety, "by preventing the impairment of health of engineers * * *." The present opinion is in direct conflict therewith by holding that such act was only intended to protect against "accidental injury."

U. S. v. B. & O. R. Co. et al., 293 U.S. 454, 55 S.Ct. 268.

VIII

The opinion has overlooked or misconstrued controlling Federal Decisions by attempting to construe the Boiler Inspection Act separate and apart from the Federal Employers' Liability Act, when such controlling decisions hold that the acts are in pari materia.

San Antonio Etc. Ry. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

[fol. 40] IX

The opinion overlooks or misconstrues controlling Federal decisions in making a distinction between a right of recovery under the Federal Employers' Liability Act for negligence and for violation of Safety Appliance Acts.

X

The opinion overlooks controlling Federal decisions holding that injury as a result of a violation of Federal Safety Appliance Acts gives rise to a cause of action under the last part of paragraph one of the Federal Employers' Liability Act for negligence.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

McCarthy v. Penna. R. Co. (C.C.A. 7) 156 Fed. 2d 877.

XI

The court, in recognizing a right of recovery for injury from the slow inhalation of dust by reason of negligence under the Federal Employers' Liability Act, but denying such right of recovery under the Boiler Inspection Act, overlooks controlling decisions holding that a violation of a Federal safety appliance act constitutes negligence within the meaning of paragraph one of the Federal Employers' Liability Act, which latter act authorizes a recovery for such negligence. Authorities supra.

XII

The court has misconstrued controlling Federal decisions in denying a right of recovery in the present case for injury from the gradual inhalation of dust when this is an action for negligence within the meaning of the Federal Employers' Liability Act and controlling decisions under that act recognize such right of recovery. Authorities supra.

XIII

The opinion in the present case is in direct and irreconcilable conflict with the opinion on prior appeal.

XIV

An important Federal question is involved on a matter never before directly adjudicated and the two opinions of this same court should be reconciled to the end that the law may be correctly established and justice done.

[fol. 41]

XV

The point upon which the case was decided by this court was not developed in the original briefs because the matter was considered to be res adjudicata on former appeal and many controlling cases were not heretofore brought to the attention of the court.

Wherefore, respondent prays that this court enter an order granting a rehearing or in the alternative that the cause be transferred to the court en banc so that an authoritative and controlling decision by the court en banc may be rendered after a full development of controlling authorities on the Federal points herein involved.

Respectfully submitted, Trusty & Pugh, Louis N. Wolf, by Guy W. Green.

[fol. 42] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING OR TO TRANSFER TO COURT EN BANC AND ORDER TRANSFERRING CAUSE TO COURT EN BANC—October 13, 1947

Now at this day, the Court having seen and fully considered the motion of the respondent for a rehearing herein, or to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled. It is further ordered by the Court that this cause be, and the same is hereby transferred to the Court en Banc on the Court's own motion.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—February 2, 1948

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 43] IN SUPREME COURT OF MISSOURI

JUDGMENT—March 8, 1948

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cass County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed.)

(Note: The Divisional Opinion was adopted by the Court en Banc, and appears at Page — of this transcript.)

[fol. 44] IN THE SUPREME COURT OF MISSOURI
EN BANC

[Title omitted]

MOTION OF RESPONDENT FOR REHEARING—Filed March 23, 1948

Comes now the Respondent herein and moves this court en banc to grant him a rehearing for the following reasons, to-wit:

I

This court has overlooked controlling decisions holding that a State court is bound to follow the interpretation of Federal Statutes placed upon them by the Federal courts, whether or not Federal conclusions seem wise.

Mooney v. Terminal R. Ass'n., 352 Mo. 1080, 186 S.W. 2d 450.

II

The opinion has overlooked or misconstrued controlling Federal decisions by construing the Boiler Inspection Act separate and apart from the Federal Employers' Liability Act, when such controlling decisions hold that the acts are in pari materia and must be construed together since the Federal Employers' Liability Act is the only act conferring a right of action.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

Tipton v. A. T. & S. Fe Ry. Co., 298 U.S. 141, 56 S. Ct. 715.

Chap. 29 Mo. R. S. A.

B. & O. R. Co. v. Groeger, 266 U.S. 521, 45 S. Ct. 169, l.c. 172.

[fol. 45] San Antonio, etc., Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626.

Lilly v. Grand Trunk R. Co., 317 U.S. 480, 87 L. Ed. 411.

McCarthy v. Pa. R. Co., (C.C.A.) 156 F. 2d 877, l.c. 879-880.

III

The opinion overlooks, or misconstrues, controlling Federal decisions in making a distinction between a right of recovery under the Federal Employers' Liability Act for negligence and for violation of Safety Appliance Acts.

IV

The opinion overlooks controlling Federal decisions holding that "injury" as a result of a violation of Federal Safety Appliance Acts gives rise to a cause of action under the last part of paragraph one of the Federal Employers' Liability Act for negligence.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S. Ct. 626.

McCarthy v. Penna. R. Co. (C.C.A. 7) 156 Fed. 2d 877.

V

The court, in recognizing a right of recovery for injury from the slow inhalation of dust by reason of negligence under the Federal Employers' Liability Act, but denying such right of recovery under the Boiler Inspection Act, overlooks controlling decisions holding that a violation of a Federal Safety Appliance Act constitutes negligence within the meaning of paragraph one of the Federal Employers' Liability Act, which latter act authorizes a recovery for such negligence. Authorities supra.

VI

The court has misconstrued controlling Federal decisions in denying a right of recovery in the present case for injury from the gradual inhalation of dust when this is an action for negligence within the meaning of the Federal Employers' Liability Act and controlling decisions under that act recognize such right of recovery. Authorities supra.

VII

This court has overlooked or misconstrued controlling opinions of the Supreme Court of the United States holding that violation of a Federal Safety Appliance Act gives rise to a right of recovery if such violation is the proximate cause of an injury, regardless of whether or not the act [fol. 46] was passed for the purpose of protecting against the particular injury suffered.

L. & N. R. R. Co. v. Layton, 244 U.S. 617, 37 S.Ct. 456.
Davis V. Wolfe, 263 U.S. 239, 44 S.Ct. 64.

VIII

This court has overlooked controlling decisions of the Supreme Court of the United States which hold that, "in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the wrong done to him contrary to said law." The opinion denies recovery for a wrong done in violation of a statute enacted specially for a class to which plaintiff belonged.

Texas and Pacific Ry. Co. v. Bigsby, 241 U.S. 33, 36 S. Ct. 482.

San Antonio Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

IX

The opinion overlooks controlling decisions of the Supreme Court of the United States holding that the Boiler Inspection Act was passed to promote safety, "by preventing the impairment of health of engineers * * *." The present opinion is in direct conflict therewith by holding that such act was only intended to protect against "accidental injury."

U. S. v. B. & O. R. Co. et al., 293 U.S. 454, 55 S.Ct. 268.

Napier v. At. Coast Line R. Co. et al., 272 U.S. 605, 47 S. Ct. 207.

X

The opinion conflicts with controlling decisions in holding that the Boiler Inspection Act limits and restricts the word "injury" as used in the Federal Employers' Liability Act to "accidental injury" when the courts have held "injury" to be broad enough to cover injury from gradual accumulation of deleterious substances.

XI

The court has misconstrued the law in holding that Section 8 of the Boiler Inspection Act modifies and restricts the broad benefits conferred by Section 2 thereof, when in fact they are separate and distinct and Section 2 would be fully operative without the rest of the act.

Cong. R., Vol. 46, part 1, p. 729, January 10, 1911.

Lilly v. Grand Trunk Western R. Co., 317 U. S. 480, 87 L.Ed. 411.

Kilburn v. Chi., M. & St. P. Ry. Co., 232 S.W. 1017.
In re Claim of A. E. Clark, 27 Op. At. Gen. 346 (Opinions of Solicitor General, Dept. of Labor, April, 1915).
In re Claim of Willard E. Jule, July 28, 1913, Opinions of Solicitor, Dept. of Labor, April, 1915, p. 261.

[fol. 47] Wherefore, Respondent prays that this court enter an order granting a rehearing.

Respectfully submitted, Trusty & Pugh, Louis N. Wolf, by Guy W. Green.

[fol. 48] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 12, 1948

Now at this day, the Court having seen and fully considered the respondent's motion for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

No. 39908

IN THE SUPREME COURT OF MISSOURI—EN BANC

[Title omitted]

MOTION TO STAY MANDATE—Filed April 22, 1948

Comes now William T. Urie, Respondent in the above entitled cause, and moves the Court to stay the mandate for ninety (90) days in the above entitled cause, to give Respondent time to prepare petition for Certiorari in the Supreme Court of the United States.

Trusty & Pugh, Louis N. Wolfe, Guy W. Green, Attorneys for Respondent, William T. Urie.

Receipt of copy of within motion acknowledged this 21st day of April, 1948. Patterson, Chastain, Cowherd & Smith, Attorneys for Appellant.

[fol. 49] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER STAYING MANDATE

Comes now the respondent, by attorney and files herein a motion to stay mandate in the above entitled cause, which motion is by the Court examined and ordered sustained for a period of ninety days from date of overruling the motion for a rehearing.

[fol. 50] IN THE SUPREME COURT OF MISSOURI—EN BANC

[Title omitted]

PRAECIPE—Filed April 22, 1948

To the Clerk of the Supreme Court of Missouri:

Please prepare a transcript of the record in the above cause to be sent to the Supreme Court of the United States in connection with appellant's application for writ of certiorari, including in said transcript the following:

1. Filing of the notice of appeal, together with copy thereof and date of filing.
2. Appellant's transcript on appeal filed in this court, and date of filing.
3. Case assigned to Division Number One.
4. Case argued and submitted.

[fol. 51] 5. Record of reversal of the judgment, and the date thereof.

6. Opinion of the court.
7. Motion of respondent for rehearing or in the alternative to transfer the case to the court en banc, and date of filing.
8. Suggestions of appellant and respondent on the above motion, together with the dates of filing.
9. Record of the overruling of the motion, together with the date thereof.
10. Record of transfer of the case to the court en banc on court's own motion, together with the date thereof.
11. Case assigned to Supreme Court en banc.
12. Case argued and submitted to Supreme Court en banc.

13. Record of reversal of judgment by court en banc, and date thereof.
14. Opinion of the court.
15. Motion of respondent for rehearing, and date of filing.
16. Suggestions of appellant and respondent on the above motion, together with dates of filing.
17. The overruling of the motion, together with the date thereof.
18. Motion to stay the mandate, and date of filing thereof.
19. Order staying the mandate.
20. This praecipe, with proof of service.
21. Certificate of the clerk.

Trusty & Pugh, Louis N. Wolf, Guy W. Green, by Guy W. Green, Attorneys for respondent, 735 Lathrop Building, Kansas City, Missouri.

Copy of the within praecipe received this 21st day of April, 1948. Patterson, Chastain, Cowherd & Smith.

[fol. 52] In the Supreme Court of Missouri—En Banc

[Title omitted]

Amended Praecipe for Transcript—Filed March 6, 1948

To the Clerk of the Supreme Court:

Please ignore the prior praecipe filed by the respondent herein and prepare a transcript of the record in the above cause in accordance with this amended praecipe to be sent to the Supreme Court of the United States in connection with respondent's application for writ of certiorari, including in said transcript the following:

1. Entry of institution of action on November 25, 1941.
2. Fourth amended petition for damages.
3. Answer to Fourth Amended Petition, together with date of filing.
4. Entry showing cause came on regularly for trial.
5. All instructions on behalf of appellant and respondent given by the court.

[fol. 53] 6. Verdict of the jury.
7. Judgment of the trial court.
8. Motion for new trial and date of filing thereof.

9. Order of court overruling motion for new trial.

10. Filing of the notice of appeal, together with copy thereof and date of filing.

11. Filing of appellant's transcript on appeal in this court.

12. Case assigned to Division Number One.

13. Case argued and submitted.

14. Record of reversal of the judgment and the date thereof.

15. Opinion of the court.

16. Motion of respondent for rehearing or in the alternative to transfer the case to the Court En Banc and date of filing.

17. Record of the overruling of said motion together with the date thereof.

18. Record of the transfer of said cause to the Court En Banc upon the court's own motion.

19. Case argued and submitted before a Court En Banc.

20. Record of reversal of the judgment by Court En Banc and the date thereof.

21. Motion of respondent for rehearing and date of filing.

22. Record of the overruling of the motion for rehearing in Court En Banc, together with the date thereof.

23. Motion to Stay the Mandate and date of filing thereof.

24. Order staying the mandate.

[fol. 54] 25. Original praecipe with proof of service.

26. Amended praecipe with proof of service.

27. Certificate of the Clerk.

Trusty & Pugh, Louis N. Wolf, Guy W. Green, Attorneys for Respondent.

Received copy of this amended praecipe this 4th day of May, 1948. L. J. Bishop, Attorneys for Appellant.

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF MISSOURI EN BANC,
JANUARY SESSION, 1948

No. 39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, A Corporation, Appellant

PRAECIPE FOR ADDITIONAL TRANSCRIPT

To the Clerk of the Supreme Court:

In addition to the record called for by the amended praecipe heretofore filed, please prepare an additional transcript in the above entitled cause to be sent to the Supreme Court of the United States in connection with respondent's petition for writ of certiorari, the following:

Second amended petition as shown in the record filed in this cause on prior appeal bearing the same style as the present appeal and being designated Number 38629 on said prior appeal.

Louis N. Wolfe, Trusty & Pugh, Guy W. Green, Attorneys for Respondent.

Received copy of within praecipe this 5th day of June, 1948. Patterson, Chastain, (Illegible) & Smith, by (Name illegible), Attorneys for Appellant.

[fol. 43] IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, SEPTEMBER TERM, 1943.

No. 38629

WILLIAM T. URIE, Appellant,

vs.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Respondent

Appeal from the Circuit Court of Cass County, Missouri

Hon. Leslie A. Bruce, Judge

SECOND AMENDED PETITION FOR DAMAGES

Plaintiff states that defendant is now and for several years past has been the duly appointed, qualified and acting trustee of the Missouri Pacific Railroad Company; that said railroad and said trustee are engaged in Interstate Commerce, and said railroad is an interstate railroad; that at the times herein mentioned the plaintiff and defendant were both engaged in interstate commerce in the operation of interstate trains and cars and engines.

Plaintiff further states that prior to March 31st, 1933, the railroad was operated by the Missouri Pacific Railroad Company and that plaintiff worked for said company as a fireman on locomotives; that on said date said railroad went into Bankruptcy under Section 77 of the Federal Bankruptcy Act; that Guy A. Thompson and L. W. Baldwin were appointed trustees for said railroad and that Mr. Baldwin subsequently resigned and that Mr. Thompson is the sole trustee; that said railroad has been operated since March 31st, 1933, by said trustees until Mr. Baldwin resigned and since then has been operated by Mr. Thompson and that plaintiff has worked as an engineer and fireman as herein set forth.

[fol. 44] Plaintiff further states that he had worked for said road and said trustee for a period of about thirty (30) years, during which time he ran principally between Joplin and Kansas City on defendant's interstate trains, and that at the time he became unable to work he was about fifty (50)

years of age; that he first discovered the injury and physical condition in May, 1940.

Plaintiff further states that through the carelessness and negligence of the defendant he became afflicted with bilateral silicosis, and that as a direct result thereof has been totally incapacitated from carrying on his duties for the railroad since May, 1940; that said conditions were a direct result of the negligence of defendants as follows:

(1) Defendant failed to keep the locomotive and appurtenance thereof upon which plaintiff was required to work in a proper and safe condition to operate in the services to which they were put without unnecessary peril to life and limb in that the defendant used in the sanding devices used on said locomotives to put sand on the rails a sand material containing a very high percentage or quantity of silica or silican dioxide, to-wit, ranging about 80 to 90 per cent and often said sanders were so that when they were set in operation to put sand under the wheels and to stop or slacken the speed or to enable said engines to pull sufficiently, excessive and unnecessary quantities of such material would frequently come from the sanding devices on to the rails and such material when used would be ground to dust by the wheels and brakes of said locomotives and dust containing such usual and unusual quantity of silican dioxide would come from such use and into the locomotives where plaintiff worked and frequently of unusual quantity and such quantity would be breathed by him and defendant knew, or by the exercise of due care should have known, that such sand material so used contained such very high percentage of silica or silican dioxide and that the dust would form and frequently of excessive quantity because [fol. 45] of said sanders, and come into the cab and be breathed and that over a period of time such breathing of such dust was dangerous to the health and life and would likely cause to the plaintiff the condition resulting to the plaintiff.

(2) Defendant negligently failed to furnish plaintiff a reasonably safe place in which to work in that the locomotives on which plaintiff was required to work as fireman were supplied with sand for the sanders thereof which contained a very high percentage of silica or silican dioxide as

above, and defendant knew such fact and still defendant used same and used said engines under the conditions above described.

(3) Although the defendant was using sandy substance containing such quantity of silica, and using said locomotives that would cause and allow large quantities of silica dust containing silica to be created and come into the cab and be inhaled, yet defendant negligently failed to warn the plaintiff and negligently failed to furnish him with a respirator or device to prevent the inhalation of said silica dust.

Plaintiff further alleges that the sanding devices on said engines were all of the usual and customary type and used for the usual and cutomary purpose and if ordinary care was exercised in keeping them adjusted such large quantities of such sandy silica material would not escape; that plaintiff does not know whether the same kind of sand containing such high quality of silica was used by other railroads operating over or through such parts of the country of Missouri; that such sanding devices operated in the same manner by the same means as devices on locomotives of other railroads, and if kept in normal and regular working condition would not allow such large quantities of silica dust to form as above stated.

Plaintiff further states that the negligent acts and omissions of said defendant operated severally or concurrently [fol. 46] in causing him to become injured and afflicted with such bilateral silicosis and caused his health and strength to be weakened and impaired, and to render him physically unable to carry on his work, and that he is permanently injured and his earning power is destroyed, all to his damage in the sum of Thirty Thousand ($30,000) Dollars, for which amount with costs he prays judgment against defendant.

William Anderson, Trusty & Pugh, Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Cole, Set:

I, Marion Spicer, Clerk of the Supreme Court of Missouri, hereby certify the foregoing is a full, true and correct transcript of the second amended petition in the cause of William T. Urie, appellant, vs. Guy A. Thompson, Trustee,

respondent, No. 38629, as called for in Respondent's praecipe for additional transcript, as fully as the same appears on file in my office.

Witness my hand and the seal of the Supreme Court of the State of Missouri at my office in the City of Jefferson City, State aforesaid, this 7th day of June, 1948.

Marion Spicer, Clerk of the Supreme Court of Missouri. (Seal.)

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.